Supreme Court, U.S.
FILED
93 1773 MAY 6 1994
OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1993

ELAINE DEATON, *et al.*,

Petitioners,

vs.

CITY OF DAYTON, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

THOMAS W. CONDIT
Counsel of Record
CONDIT & DRESSING CO., L.P.A.
Attorneys for Petitioners
5041 Oaklawn Drive
Cincinnati, Ohio 45227
(513) 351-9700

5167
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED FOR REVIEW

1. Has the Sixth Circuit Court of Appeals violated the mandate of *Owens v. Okure*, 488 U.S. 235 (1989), for § 1983 claims in Ohio by adopting a two year statute of limitation for "bodily injury" instead of a four year residual personal injury statute?

2. Has the Sixth Circuit Court of Appeals violated the principles of 42 U.S.C. § 1988 by refusing to adopt, in the absence of Ohio Supreme Court precedent, the construction of Ohio's personal injury statutes as defined by an Ohio Court of Appeals?

PARTIES TO THE PROCEEDINGS

The names of all of the parties to the proceedings in the United States Court of Appeals for the Sixth Circuit are as follows:

Plaintiffs/Appellants/Petitioners:

Elaine Deaton, Constance Hurrier[1], Geraldine Dzikowski, Virginia Bachelier, Kathleen Dewey, Marcella Tilford, Estelle Quallen and Margaret Geis.

Defendants/Appellees:

City of Dayton and Billy C. Russell.

Unidentified individuals designated as defendants "John Smith(s) and Jane Smith(s)" in the original Complaint were never identified in this action and did not participate at any stage of the proceedings below.

None of the parties is a corporation, except that Respondent City of Dayton is a municipal corporation organized under the laws of Ohio. *See* Rule 29.1.

---

1. Constance Hurrier was killed in an automobile accident while this action was pending before the Sixth Circuit, and her surviving spouse, Paul Hurrier, has been substituted as a party.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statutes Involved	1
Statement of the Case	4
A. Statement of Facts	4
B. Proceedings	5
Reasons for Granting the Writ	6
I. The Sixth Circuit Court of Appeals has violated the mandate of *Owens v. Okure*, 488 U.S. 235 (1989), for § 1983 claims in Ohio by adopting a two year statute of limitation for "bodily injury" instead of a four year residual personal injury statute.	6
A. Supreme Court Precedent.	7
B. Sixth Circuit Case Law.	9

Contents

Page

C. Ohio Case Law. 10

II. The Sixth Circuit Court of Appeals has violated the principles of 42 U.S.C. § 1988 by refusing to adopt, in the absence of Ohio Supreme Court precedent, the construction of Ohio's personal injury statutes as defined by an Ohio Court of Appeals. 13

Conclusion 15

TABLE OF CITATIONS

Cases Cited:

Amer v. Akron City Hosp., 47 Ohio St. 2d 85, 351 N.E. 2d 479 (1976) 11

Bojac Corp. v. Kutevac, 64 Ohio App. 3d 368 (Trumble Co. 1990) 6, 13, 14

Browning v. Pendleton, 869 F.2d 989 (6th Cir. 1989) 9, 13

Collard v. Kentucky Board of Nursing, 896 F.2d 179 (6th Cir. 1990) 10

Corpman v. Boyer, 171 Ohio St. 233, 169 N.E. 2d 14 (1960) 12

Elaine Deaton, et al., v. City of Dayton, et al., Case No. 92-4289 (6th Cir. 12/8/93) 1

Contents

	Page
Elaine Deaton, et al., v. City of Dayton, et al., Case No. C-3-92-152 (S.D. Ohio 11/3/92 (unreported)	1
Elzy v. Robinson, 868 F.2d 793 (5th Cir. 1989)	14
Fidelity Union Trust Co. v. Field, 311 U.S. 169, 61 S. Ct. 176, 85 L. Ed. 109 (1940)	14
Gray v. Lacke, 885 F.2d 399 (7th Cir. 1989)	14
Lawyers Cooperative Publishing Co. v. Meuthing, 65 Ohio St. 3d 273, 603 N.E. 2d 969 (1992)	11
Owens v. Okure, 488 U.S. 235 (1989)	i, 6, 8, 9, 10, 12, 13
Small v. Inhabitants of City of Belfast, 796 F.2d 544 (1st Cir. 1986)	14
Wilson v. Garcia, 471 U.S. 261, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985)	6, 8, 10, 12
Yaklevich v. Kemp, Schaeffer & Rowe, 68 Ohio St. 3d 294 (1994)	11
Yeager v. Local Union 20, 6 Ohio St. 3d 369 (1983)	10, 11

Statutes Cited:

28 U.S.C. § 1254	1
28 U.S.C. § 1331	5

Contents

Page

28 U.S.C. § 1343 5

42 U.S.C. § 1983 ..... i, 1, 5, 6, 7, 8, 10, 13

Ohio Revised Code:

§ 2305.09 ..... 2, 7, 10, 12

§ 2305.09(D) 6, 9, 11, 12, 13

§ 2305.10 ..... 3, 7, 11

§ 2305.14 12

Other Authority Cited:

Restatement of the Law 2d, Torts (1965) 7 i, § 46(1) 11

APPENDIX

Appendix A — Order Denying Petition for Rehearing of the United States Court of Appeals for the Sixth Circuit Filed February 24, 1994 ..... 1a

Appendix B — Opinion of the United States Court of Appeals for the Sixth Circuit Filed December 8, 1993 . 3a

Appendix C — Decision and Order of the United States District Court for the Southern District of Ohio, Western Division at Dayton Filed November 3, 1992 ..... 11a

OPINIONS BELOW

The written decision of the United States Court of Appeals for the Sixth Circuit is titled *Elaine Deaton, et al., v. City of Dayton, et al.*, Case No. 92-4289 (6th Cir. 12/8/93) (unreported).

The written decision of the United States District Court for the Southern District of Ohio (Western Division) is titled *Elaine Deaton, et al., v. City of Dayton, et al.*, Case No. C-3-92-152 (S.D.Ohio 11/3/92) (unreported).

STATEMENT OF JURISDICTION

This action originated in the United States District Court for the Southern District of Ohio, and was brought pursuant to 42 U.S.C. § 1983.

The judgment of the United States Court of Appeals for the Sixth Circuit, affirming the dismissal of all claims, was entered on December 8, 1993. The Order of the Sixth Circuit denying a petition for rehearing en banc was entered on February 24, 1994.

By Order of this Court (Associate Justice Stevens) dated February 22, 1994, the time for filing a Petition for a Writ of Certiorari has been extended to and including May 7, 1994.

This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTES INVOLVED

Title 42 United States Code:

§ 1988 Proceedings in Vindication of Civil Rights; attorney's fees.

The jurisdiction in civil and criminal matters conferred

on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS", and of Title "CRIMES", for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Ohio Revised Code:

§ 2305.09 Four Years; Certain Torts.

An action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

(C) For relief on the ground of fraud;

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

§ 2305.10 Bodily Injury or Injury to Personal Property.

An action for bodily injury or injury to personal property shall be brought within two years after the cause thereof arose.

For purposes of this section, a cause of action for bodily injury caused by exposure to asbestos or to chromium in any of its chemical forms arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured by the exposure, whichever date occurs first.

For purposes of this section, a cause of action for bodily injury incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure.

As used in this section, "agent orange," "causative agent," and "veteran" have the same meanings as in section 5903.21 of the Revised Code.

For purposes of this section, a cause of action for bodily

injury which may be caused by exposure to diethylstilbestrol or other nonsteroidal synthetic estrogens, including exposure before birth, arises upon the date on which the plaintiff learns from a licensed physician that he has an injury which may be related to such exposure, or upon the date on which by the exercise of reasonable diligence he should have become aware that he has an injury which may be related to such exposure, whichever date occurs first.

STATEMENT OF THE CASE

A. Statement of Facts

The factual record is comprised solely of the Affidavit of Plaintiff/Petitioner Kathleen Dewey, from which the relevant facts can be summarized as follows:

1. On March 29, 1989 Petitioners were arrested for criminal trespass, a nonviolent misdemeanor, while engaged in a protest at an abortion center in Kettering, Ohio.

2. Petitioners were transported to and housed as pre-trial detainees in the Dayton Human Rehabilitation Center ("DHRC") for approximately 11 days, where they were all strip searched as part of the intake and visitation procedures. During their incarceration, Petitioners believed that they were held in a facility of Montgomery County, Ohio, and supervised by County employees.

3. In March 1991, Petitioners filed a lawsuit against Montgomery County, Ohio and its employees, only to learn later that DHRC was operated by the City of Dayton.

4. This action against the City of Dayton and DHRC Superintendent Billy Russell was filed on April 7, 1992,

approximately three (3) years after the unconstitutional strip searches occurred.

B. Proceedings

On April 7, 1992, Petitioners Elaine Deaton, Constance Hurrier, Geraldine Dzikowski, Virginia Bachelier, Kathleen Dewey, Marcella Tilford, Estelle Quallen and Margaret Geis (collectively "Petitioners") filed a Complaint in the United States District Court for the Southern District of Ohio, Western Division, charging Defendants City of Dayton and Billy C. Russell (hereinafter referred to jointly as "the City"), and unidentified John Smith and Jane Smith Defendants with conducting illegal and unconstitutional strip searches. The jurisdiction of the District Court was invoked pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1331 and § 1343. The Complaint sought compensatory and punitive damages, costs and reasonable attorney fees pursuant to 42 U.S.C. § 1988.

On May 27, 1992 the District Court issued a Pretrial Order limiting all action in the case to the resolution of the statute of limitations issue. On November 3, 1992, the District Court entered a Decision and Order granting the City's Motion for Summary Judgment on the statute of limitations issue and dismissing all claims with prejudice. On November 27, 1992, Petitioners filed a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit, which affirmed the judgment of the District Court on December 8, 1993. On December 22, 1993 Petitioners filed a Application for Rehearing En Banc, which was denied by the Sixth Circuit in an Order dated February 24, 1994.

This Petition for a Writ of Certiorari is filed pursuant to an Order of this Court extending the time for filing until May 7, 1994.

REASONS FOR GRANTING THE WRIT

Petitioners respectfully submit that a writ of certiorari should be granted because of the Sixth Circuit's misapplication of Ohio's personal injury statutes, in the context of the following principles:

(1) The Sixth Circuit's decision violates the spirit and the underlying rationale of *Wilson v. Garcia*, 471 U.S. 261 (1985), which broadly characterized 42 U.S.C. § 1983 ("§ 1983") as conferring "a general remedy for injuries to personal rights";

(2) The Sixth Circuit's decision violates the specific holding of *Owens v. Okure*, 488 U.S. 235 (1989), which instructs the lower courts to adopt a state's "general or residual" statute of limitation for personal injuries, and specifically endorses, for states where there are multiple personal injury statutes, language nearly identical to that found in R.C. § 2305.09(D);

(3) The Sixth Circuit's decision disregards various decisions of the Supreme Court of Ohio clearly applying R.C. § 2305.09(D) as a residual personal injury statute;

(4) The Sixth Circuit's decision disregards the binding effect of *Bojac Corp. v. Kutevac*, 64 Ohio App. 3d 368 (1990), a post-*Owens* decision by an intermediate state court selecting R.C. § 2305.09(D) as the residual personal injury statute of limitations for § 1983 actions in Ohio.

I. THE SIXTH CIRCUIT COURT OF APPEALS HAS VIOLATED THE MANDATE OF *OWENS V. OKURE*, 488 U.S. 235 (1989), FOR § 1983 CLAIMS IN OHIO BY ADOPTING A TWO YEAR STATUTE OF LIMITATION FOR "BODILY INJURY" INSTEAD OF A FOUR YEAR RESIDUAL PERSONAL INJURY STATUTE.

The two Ohio statutes which form the crux of this dispute state

in relevant part (emphasis supplied):

> **§ 2305.10 Bodily Injury or Injury to Personal Property.**
>
> An action for *bodily injury* or injury to personal property shall be brought within two years after the cause thereof arose....

and

> **§ 2305.09 Four Years; Certain Torts.**
>
> An action for any of the following causes shall be brought within four years after the cause thereof accrued:
>
> * * *
>
> (D) *For an injury to the rights of the plaintiff not arising on contract nor enumerated* in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

Petitioners submit that a reading of these two statutes, in light of the case law discussed below, justifies *summary reversal* of the Sixth Circuit's decision in this case.

A. Supreme Court Precedent.

In the absence of guiding federal principles on § 1983 issues, the federal courts are instructed to apply state law principles which are not inconsistent with federal law. 42 U.S.C. § 1988. Looking to the various state laws, the lower courts struggled for years to select the appropriate statute of limitations for § 1983 cases, having to analogize between the respective state statutes and whatever

federal causes of action were at issue in a given case. Such an approach, however, bred confusion and inconsistency.

This Court took a major step toward clearing up the confusion when it decided *Wilson v. Garcia*, 471 U.S. 261, 85 L.Ed.2d 254, 105 S. Ct. 1938 (1985), determining that the lower courts should abandon the confusing practice of characterizing claims and instead borrow and apply to *all* § 1983 claims in a given state a *single* statute of limitations. The *Wilson* Court went on to reject the application of intentional tort statutes in favor of a state's personal injury statute. Reviewing the history, purpose and policies underlying § 1983, the *Wilson* Court stated:

> Had the 42d Congress expressly focused on the issue decided today, we believe it would have characterized § 1983 as conferring a general remedy for injuries to personal rights.

Wilson v. Garcia, 471 U.S. at 278.

Unfortunately, *Wilson* led to new confusion in states such as Ohio, where more than one personal injury statute exists. This Court addressed the dilemma of multiple personal injury statutes in *Owens v. Okure*, 488 U.S. 235, 102 L. Ed. 2d 594, 109 S. Ct. 573 (1989), rejecting New York's one year statute of limitations (covering eight intentional torts) in favor of its three year statute for actions "to recover damages for a personal injury except as [otherwise] provided . . . ." *Owens* held that "where state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions. *Id.* at 249-50.

The *Owens* Court reasoned:

> In marked contrast to the multiplicity of state intentional

> tort statutes of limitations, every State has one general or residual statute of limitations governing personal injury actions. Some states have a general provision which applies to all personal injury actions with certain specific exceptions. Others have a residual provision which applies to all actions not specifically provided for, including personal injury actions. *Whichever form they take, these provisions are easily identifiable by language or application.* Indeed, the very idea of a general or residual statute suggests that each State would have no more than one. Potential § 1983 plaintiffs and defendants therefore can easily ascertain, with little risk of confusion or unpredictability the applicable limitations period in advance of filing a § 1983 action.

488 U.S. at 245-48 (emphasis supplied). The language in R.C. § 2305.09(D) is clearly that referred to in *Owens* as "easily identifiable by language or application". No other Ohio personal injury statute has language even remotely resembling it.

B. Sixth Circuit Case Law.

In spite of this clear and unambiguous guidance from *Owens*, the Sixth Circuit refuses to adopt or even discuss the language in R.C. § 2305.09(D). Offering, for the first time, its rationale for choosing Ohio's "bodily injury" statute in *Browning v. Pendleton*, 869 F.2d 989 (6th Cir. 1989)(en banc), the Sixth Circuit explained below that "we equated the general, unintentional personal injury cause of action referred to by the Supreme Court with the general, unintentional 'bodily injury' cause of action in Ohio Rev. Code § 2305.10." Curiously, this rationale was not stated in *Browning* or in any other Sixth Circuit decision prior to this case; § 2305.09(D) itself was mentioned nowhere in *Browning*.

Moreover, in spite of Petitioners' prodding, the Sixth Circuit has offered no analysis of § 2305.09(D) in this case either. Only

Senior District Judge Charles W. Joiner, sitting by designation from the Eastern District of Michigan, analyzed R.C. § 2305.09 in a separate concurring opinion and fully agreed with Petitioners. *See* Appendix at page 6a. Contrary to *Wilson* and *Owens*, the Sixth Circuit has adopted an extraordinarily narrow definition of personal injury (*i.e.*, "bodily injury") for Ohio's § 1983 claims, and refuses to consider the residual statute used for "non-bodily" personal injuries.

Collard v. Kentucky Board of Nursing, 896 F.2d 179 (6th Cir. 1990), a nearly identical case decided by the Sixth Circuit for Kentucky, does no harm to Petitioners arguments. In *Collard*, the Sixth Circuit rejected a five year "personal rights" statute in favor of a one year statute for "injury to the person". The Sixth Circuit noted that the language "personal injury" appears nowhere else in Kentucky's statutory scheme and apparently concluded that the one year statute covered all personal injuries, both "bodily" and "non-bodily". The same conclusion simply cannot be drawn from Ohio's scheme and the judicial construction given to it by the Ohio Courts.

C. Ohio Case Law.

A review of Ohio case law exposes the flaws in the Sixth Circuit's approach. Ohio law clearly recognizes causes of action for "personal injuries" which involve more than mere "bodily injury", and § 2305.09(D) is always part of the analysis.

When the Supreme Court of Ohio first recognized the intentional infliction of emotional distress as an actionable tort in Ohio, it applied the four year limitations period found in R.C. § 2305.09(D). *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 375 (1983). The standard adopted in *Yeager* leaves no doubt that it is a tort sounding in personal injury:

> One who by extreme and outrageous conduct

> intentionally or recklessly causes *severe emotional distress* to another is subject to liability from such emotional distress, and if *bodily harm* to the other results from it, for such *bodily harm.*

Restatement of the Law 2d, Torts (1965) 71, § 46(1). *Id.* at 374 (emphasis supplied).

More recently in *Lawyers Cooperative Publishing Co. v. Meuthing*, 65 Ohio St. 3d 273, 603 N.E. 2d 969 (1992), the Supreme Court of Ohio considered applying R.C. § 2305.09(D) to the tort of the negligent infliction of emotional distress. While discussing the emotional pain and distress which are the subject of these two "emotional distress" torts, the court stated: "There is no doubt that these are personal injuries." 65 Ohio St.3d at 280. Although the *Muething* court ultimately applied the two year statute of limitations embodied in R.C. § 2305.10 for the negligent infliction of emotional distress, it appears to have done so only because of the derivative relationship between that tort and the fear of "bodily injury". 65 Ohio St. 3d at 280. As Judge Joiner observed on page four of his concurring opinion below: "Implicit in this analysis was the court's recognition that § 2305.09(D) would apply *only if* one of the statutes listed therein did not." (Original emphasis). *See* Appendix at pages 9a - 10a.

Other "injuries to the person" for which the Supreme Court of Ohio has applied the four year provision of § 2305.09(D) include the loss of consortium, *Amer v. Akron City Hosp.*, 47 Ohio St.2d 85, 351 N.E.2d 479 (1976), and abuse of process. *Yaklevich v. Kemp, Schaeffer & Rowe*, 68 Ohio St. 3d 294 (1994). Significantly, the *Yaklevich* court referred to *Yeager* parenthetically by noting that the "four year statute of limitations [is] applicable to an *injury* not listed in any of the sections referred to in R.C. 2305.09." 68 Ohio St. 3d at 300. (Emphasis supplied). Clearly, the Supreme Court of Ohio has decided that R.C. § 2305.09(D) is Ohio's residual personal injury statute and regularly discusses it in that context.

Finally, Petitioners are compelled to address the argument propounded by the City in the proceedings below: that § 2305.09(D) is actually the type of "catch-all" statute rejected by *Wilson* and *Owens*, 488 U.S. at 250, n. 12. The City has managed to find an old Ohio case which referred to "the catch-all clause of § 2305.09(D)". *Corpman v. Boyer*, 171 Ohio St. 233, 169 N.E. 2d 14 (1960). This, however, is a feckless argument for several reasons.

First, it pays homage to a phrase found in a 24 year old case while ignoring the manner in which the statute has been used by Ohio's courts. Even *Corpman* is a loss of consortium case which relied on § 2305.09(D). Second, from a functional standpoint, it is clear that Ohio's catch-all statute (ten years) is found in R.C. § 2305.14, which states:

> **§ 2305.14 FOR OTHER RELIEF**
>
> An action for relief not provided for in sections 2305.04 to 2305.131 [2305.13.1], inclusive, and section 1304.29 of the Revised Code, shall be brought within ten years after the cause of action accrued. This section does not apply to an action on a judgment rendered in another state or territory.

Surely the City does not suggest that Ohio has two catch-all statutes.

Third, R.C. § 2305.09 is accompanied by the title "Certain Torts," which limits its application much more so than the "For Other Relief" label attached to § 2305.14. Clearly, § 2305.09(D) is Ohio's residual personal injury statute and § 2305.14 is Ohio's catch-all statute. Finally, even if one insists on calling R.C. § 2305.09 a "catch-all" statute, its use is clearly compatible with, and even required by, the express language in *Owens*, 488 U.S. at 246, n.9; 488 U.S. at 251, n.12.

II. THE SIXTH CIRCUIT COURT OF APPEALS HAS VIOLATED THE PRINCIPLES OF 42 U.S.C. § 1988 BY REFUSING TO ADOPT, IN THE ABSENCE OF OHIO SUPREME COURT PRECEDENT, THE CONSTRUCTION OF OHIO'S PERSONAL INJURY STATUTES AS DEFINED BY AN OHIO COURT OF APPEALS.

In *Bojac Corp. v. Kutevac*, 64 Ohio App. 3d 368, 370 (Trumble Co. 1990), the Court of Appeals for Trumble County, Ohio determined, in a post-*Owens* analysis, that R.C. § 2305.09(D) is the general or residual statute for personal injury actions in Ohio. To Petitioners' knowledge, *Bojac* is the only Ohio appellate case offering a post-*Owens* analysis of Ohio law without relying on Sixth Circuit precedent. All other Ohio cases cited in this action by the Sixth Circuit and the City rely upon the Sixth Circuit's dubious *Browning* rationale and present no independent state court analysis of the relevant Ohio statutes.

Petitioners submit that the Sixth Circuit erred, and engaged in the wrong analysis, when it concluded in this case that it did not have to follow *Bojac* because "the problem of characterization 'is ultimately a question of federal law.'" *See* Sixth Circuit opinion at Appendix page 5a. Petitioners submit that the "characterization" game ended with *Wilson's* broad characterization of all § 1983 claims as personal injuries. The issue has now shifted to one of applying state law, and requires an interpretation of a state's statutory scheme for personal injuries. This is, at best, a hybrid of state/federal law and the *Owens* directive to apply a residual statute of limitations which "embraces, either explicitly or by *judicial construction,* unspecified personal injury actions", *Owens,* 488 U.S. at 250, n. 12 (emphasis supplied), clearly requires an analysis of state court judicial decisions. The fact that federal law is defined by state law for issues such as this is a bit confusing, but should not allow the lower federal courts to disregard state law altogether, as the Sixth Circuit has done here.

The other federal circuits seem to understand their duty to look to state law. *See Elzy v. Robinson,* 868 F.2d 793, 794 (5th Cir. 1989)(referencing Louisiana case law); *Gray v. Lacke,* 885 F.2d 399, 408 (7th Cir. 1989)(referencing Wisconsin case law); *Small v. Inhabitants of City of Belfast,* 796 F.2d 544 (1st Cir. 1986) (referencing Maine case law).

Returning to the significance of *Bojac,* this Court has previously made clear that the decisions of *intermediate* state courts are binding on the federal courts on issues of state law:

> The highest state court is the final authority on state law, but it is still the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and apply that law, even though it has not been expounded by the highest court of the State. . . . An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question.

Fidelity Union Trust Co. v. Field, 311 U.S. 169, 177-78, 61 S.Ct. 176, 178, 85 L. Ed. 109 (1940)(case involving the construction and effect of a state statute).

The *Bojac* case, therefore, provides a second reason why the Sixth Circuit must be reversed in this case. Any other result empowers federal circuit courts to override the state courts on matters of state law.

CONCLUSION

The decision of the Sixth Circuit Court of Appeals violates the binding decisions of this Court and disregards the judicial construction given to Ohio's personal injury statutes, both implicitly and explicitly, by the Supreme Court of Ohio and an intermediate state court. Petitioners respectfully suggest again that summary reversal is appropriate in this case.

Respectfully submitted,

THOMAS W. CONDIT
Counsel of Record
CONDIT & DRESSING CO., L.P.A.
Attorneys for Petitioner
5041 Oaklawn Drive
Cincinnati, Ohio 45227
(513) 351-9700

APPENDIX A — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED FEBRUARY 24, 1994

No. 92-4289

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ELAINE DEATON, ET AL.,

Plaintiffs-Appellants,

v.

CITY OF DAYTON, ET AL.,

Defendants-Appellees.

ORDER

BEFORE: MARTIN and BOGGS, Circuit Judges; and JOINER,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

---

* Hon. Charles W. Joiner, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

Appendix A

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED DECEMBER 8, 1993

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 92-4289

ELAINE DEATON, *et al.*

Plaintiffs-Appellants,

v.

CITY OF DAYTON, *et al.*

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BEFORE: MARTIN and BOGGS, Circuit Judges; and JOINER, Senior District Judge.*

PER CURIAM. Elaine Deaton, Constance Hurrier, Geraldine Dzikowski, Virginia Bachelier, Kathleen Dewey, Marcella Tilford, Estelle Quallen, and Margaret Geis appeal the dismissal of their civil rights action brought pursuant to 42 U.S.C. § 1983. The district court found that the plaintiffs' claims were barred by the two-year Ohio statute of limitations for personal injury actions. We affirm.

---

* The Honorable Charles W. Joiner, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

Appendix B

On March 24, 1989, the plaintiffs were arrested while engaging in an anti-abortion protest at the Dayton Women's Health Center in Kettering, Ohio. Plaintiffs allege that they were taken to the Dayton Hurman Rehabilitation Center and subjected to unlawful strip and body cavity searches. They subsequently filed suit against the city of Dayton, Superintendent Billy C. Russell of the Rehabilitation Center, and various unnamed defendants on April 7, 1992, more than three years after the alleged incident.

In *Browning v. Pendleton,* 869 F.2d 989, 992 (6th Cir. 1989) (en banc), this Court held that civil rights actions arising in Ohio must be brought within two years of their accrual, pursuant to Ohio Rev. Code § 2305.10. In reaching this conclusion, the *Browning* court relied on *Wilson v. Garcia, 471* U.S. 261 (1985) (single state personal injury statute of limitations must be borrowed for § 1983 purposes), and *Owens v. Okure,* 488 U.S. 235, 239 (1989) (if multiple state personal injury statutes exist, court must borrow general or residual unintentional tort statute). In *Browning,* 869 F.2d at 991, we equated the general, unintentional personal injury cause of action referred to by the Supreme Court with the general, unintentional "bodily injury" cause of action in Ohio Rev. Code § 305.10. This statute, as stated above, carries a two-year statute of limitations. Plaintiffs' cause of action accrued on March 24, 1989. *See Sevier v. Turner,* 742 F.2d 262, 272 (6th Cir. 1984) (accrual occurs when plaintiff knows or has reason to know of injury that is basis of his action). As plaintiffs did not file their complaint until more than three years after that date, their action is barred by the statute of limitations.

Plaintiffs argue strenuously that this Court is bound by the decision in *Bojac Corp. v. Kutevac,* 64 Ohio App. 3d 368 (1990), which held that Ohio Rev. Code § 2305.09 was the applicable general personal injury statute for civil rights actions, rather than

Appendix B

§ 2305.10. Section 2305.09 provides for a four-year statute of limitations. Plaintiffs' contention is without merit.

When federal courts borrow state statutes of limitations for § 1983 claims, it is well settled that "the problem of characterization 'is ultimately a question of *federal* law.'" *Collard v. Kentucky Bd. of Nursing*, 896 F.2d 179, 183 (6th Cir. 1990) (quoting *Wilson*, 471 U.S. at 26970 (emphasis added)). The Sixth Circuit, following *Owens* and *Wilson*, has repeatedly characterized § 2305.10, with its two-year statute of limitations, as the applicable Ohio personal injury statute for § 1983 civil rights actions. *See, e.g, Browning*, 869 F.2d at 990; and *Farber v. Massillon Board of Education*, 917 F.2d 1391, 1400 (6th Cir. 1990), *cert. denied*, 498 U.S. 1082 (1991). Plaintiffs' claims are therefore barred.

For the foregoing reasons, the decision of the district court is affirmed.

Appendix B

NO. 92-4289
ELAINE DEATON. et al. v. CITY OF DAYTON,. et al.

CHARLES W. JOINER, Senior District Judge, concurring. I concur in the affirmance of the district court's judgment, recognizing that *Browning v. Pendleton,* 869 F.2d 989 (6th Cir. 1989) (en banc), binds this panel, and requires the application of Ohio's two-year statute of limitations. However, *Browning* did not consider adoption of the statute advanced by plaintiffs.[1] I am persuaded that plaintiffs are correct in their contention that Ohio Rev. Code § 2305.09 is the appropriate statute of limitations to apply to civil rights actions under 42 U.S.C. § 1983.

In *Wilson v. Garcia,* 471 U.S. 261 (1985), the Supreme Court held that § 1983 actions are properly characterized under federal law as tort actions for personal injuries, explaining that the atrocities that led to the enactment of § 1983 "plainly sounded in tort," and that a violation of a constitutional right is "an injury to the individual rights of the person," thus making the tort analogy appropriate. *Id.* at 277. Based upon this characterization, the Court affirmed the appellate court's application of the state's three-year statute for "injury to the person or reputation of any person." *Id.* at 280. Recognizing that § 1983 provided a general remedy for injuries to personal rights, the Court stated that the relative scarcity of statutory claims when Congress enacted § 1983 in 1871 made it "unlikely that Congress would have intended to apply the catchall periods of limitations for statutory claims that were later enacted by many States." *Id.* at 278.

---

1. The choice in *Browning* was between the two-year statute, Ohio Rev. Code § 2305.10, and the one-year statute, § 2305.11. As far as can be discerned from the decisions of this court, the applicability of § 2305.09 was neither argued in *Browning* nor decided *sub silentio. See Brownina v. Pendleton,* 1988 U.S. App. LEXIS 4510 (6th Cir. 1988).

Appendix B

While *Wilson* intended to eliminate the conflict among the lower courts in choosing the appropriate statute of limitations for 1983 actions, the decision simply narrowed the conflict to a different arena. The next question confronted by courts was *which* personal injury statute of limitations should be borrowed for § 1983 suits. *Owens v. Okure*, 488 U.S. 235 (1989), answered that question, holding that in a state which has more than one personal injury statute, the general or residual statute governing personal injury actions is to be applied:

> Some States have a general provision which applies to all personal injury actions with certain specihc exceptions. Others have a residual provision which applies to all actions not specifically provided for, including personal injury actions. Whichever form they take, these provisions are easily identifiable by language or application. Indeed, the very idea of a general or residual statute suggests that each State would have no more than one.

488 U.S. at 246-48 (footnotes omitted). Attempting to clarify its earlier rejection of "catchall" statutes of limitations, the Court stated:

> Our decision today is fully consistent with *Wilson's* rejection of a state residual, or "catchall," limitations provision as the appropriate one for 1983 actions. 471 U.S., at 278. In *Wilson*, we rejected recourse to such provisions in the first instance, a position we continue to embrace. Courts should resort to residual statutes of limitations only where state law provides multiple statutes of limitations for personal injury actions and *the residual one embraces, either explicitly or by judicial construction. unspecified personal injury actions.*

Id. at 250 n.12 (emphasis added).

Taken together, *Wilson* and *Owens* instruct that in determining the appropriate statute of limitations to borrow for § 1983 actions, we are to start with the state statute of limitations for personal injury actions. If a state has more than one such statute, we are to apply the general or residual statute. To determine which statute falls into that category, we are to look at the express language of the statute and the manner in which it has been construed. The statute which embraces unspecified personal injury actions is the appropriate statute to borrow.

The two Ohio statutes of limitations at issue are Ohio Rev. Code § 2305.10 (already selected by this court as the appropriate statute) and § 2305.09. They provide in pertinent part as follows:

> **§ 2305.10 Bodily injury or injury to personal property.**
>
> An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.
>
> **§ 2305.09 Four years; certain torts.**
>
> An action for any of the following causes shall be brought within four years after the cause thereof accrued:
>
> (A) For trespassing upon real property;
>
> (B) For the recovery of personal property, or for taking or detaining it;
>
> (C) For relief on the ground of fraud;

> (D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

Subsection 2305.09(D)'s reference to actions for injuries to the rights of the plaintiff not enumerated in the designated sections expressly and unequivocally "embraces . . . unspecified personal injury actions," *Owens*, 488 U.S. at 250 n.12, and the statute has been so construed by the Ohio Supreme Court. In *Yeager v. Local Union 20*, 6 Ohio St. 3d 369, 453 N.E.2d 666 (1983), the Ohio Supreme Court first recognized the tort of intentional infliction of emotional distress, and then was required to determine whether the plaintiff's action was time-barred. The answer to this issue was easily determined: because "the tort of intentional infliction of serious emotional distress [was] not listed in any of the sections referred to in R.C. 2305.09, the applicable statute of limitations for this cause of action will be four years." 453 N.E.2d at 672.

More recently, the Ohio Supreme Court was required to decide whether an attorney's negligence claims against a publisher of legal forms was governed by § 2305.09 or § 2305.10. *Lawyers Cooperative Publishing Co. v. Muething*, 603 N.E.2d 969 (Ohio 1992). After examining the provisions of both, the court stated that it was required to ascertain whether the plaintiff's claims fell within § 2305.10. Implicit in this analysis was the court's recognition that § 2305.09(D) would apply *only if* one of the statutes listed therein did not. Turning its focus then to § 2305.10, the court concluded that the attorney's cause of action for damage to his law practice was an action for injury to personal property, and that his negligence claim was an action for "bodily injury," making both claims subject to § 2305.10. Critical to the court's determination of the negligence claim was its recognition that *no* recovery was possible unless the plaintiff first proved that he had

feared or seen physical consequences or quantifiable physical loss, *i.e.*, "bodily injury" within the meaning of § 2305.10. 603 N.E.2d at 974-75.

Both *Yeager* and *Muething* demonstrate that § 2305.09 is Ohio's residual statute of limitations for personal injury actions. Based on *Owens*, § 2305.09 is the correct statute to borrow for civil rights actions under 42 U.S.C. § 1983. The only court, state or federal, to have expressly considered the residual nature of § 2305.09 agrees. *Bojac Corp. v. Kutevac*, 64 Ohio App. 3d 368, 581 N.E. 2d 625 (1990).[2]

Finally, the propriety of adopting § 2305.09 as the statute applicable to § 1983 claims is in no way undercut by this court's decision in *Collard v. Kentucky Board of Nursing*, 879 F.2d 179 (6th Cir. 1990). There the court rejected a Kentucky statute applicable to actions for injuries to the rights of plaintiffs in favor of Kentucky's "personal injury" statute of limitations, stating that in the interest of simplicity and uniformity, the Supreme Court designated "personal injury" statutes as the benchmark. *Id.* at 182. Such a facile solution is not available in Ohio, where there is no general "personal injury" statute, and the choice is between a "personal rights" statute and a "*bodily* injury" statute. As the Supreme Court recognized in *Wilson*, 1983 "confer[s] a general remedy for injuries to personal rights." 471 U.S. at 278.

For these reasons, I am persuaded that the plaintiffs are correct in their assertion that § 2305.09 is the correct statute to borrow in § 1983 cases.

---

2. The wisdom of adopting § 2305.09 is neither enhanced by, nor detracted from, the litany of cases cited by defendants and alluded to by the panel decision. This court has spoken in *Browning*, binding subsequent panels in this court and all of the district courts. In none of the Ohio cases relied upon by the defendants was the issue under consideration here advanced or decided.

APPENDIX C — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION AT DAYTON FILED NOVEMBER 3, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Case No. C-3-92-152

Magistrate Judge Michael R. Merz

ELAINE DEATON, et al.,

Plaintiff(s),

- vs -

CITY OF DAYTON, et al.,

Defendant(s).

DECISION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This is an action by Plaintiffs to recover damages for being subjected to allegedly unlawful strip and body cavity searches when they were arrested for their participation in an abortion protest in March, 1989.

Plaintiffs bring suit under both 42 U.S.C. § 1983 and Ohio Revised Code § 2933.32, thus invoking this Court's subject matter jurisdiction under 28 U.S.C. § 1331, 1343, and 1367.

Appendix C

Defendants assert that all claims are barred by the applicable statutes of limitations.

Congress has adopted no statute of limitations for actions under 42 U.S.C. § 1983, so the federal courts "borrow" state statutes of limitations. For many years this seemingly simple rule led to quite diverse results. To correct the confusion and injustice, the United States Supreme Court determined in *Wilson v. Garcia,* 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985), that in each state a single state statute of limitations the statute applicable to personal injuries was the one which would be borrowed. Applying that rule, the Sixth Circuit Court of Appeals has determined that Ohio's two year statute for personal injuries, Ohio Revised code § 2305.10, would be applicable. *Browning v. Pendleton,* 869 F.2d 989 (6th Cir. 1989); *Farber v. Massilon Board of Education,* 917 F. 2d 1391 (6th Cir. 1990), *cert. denied,* __ U.S. __, 115 L.Ed.2d 1019 (1991). Since the conduct of which Plaintiffs complain occurred more than three years before the Complaint in this action was filed, Plaintiffs' claims under 42 U.S.C. § 1983 are time barred.

Plaintiffs acknowledge *Browning* and *Farber,* but claim the Sixth Circuit in those cases misapplied the relevant Supreme Court authority, *Owens v. Okure,* 488 U.S. 235, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989). In that case the Supreme Court determined a three-year New York personal injury statute should be applied rather than the one-year statute applicable to intentional torts. In so doing, the Supreme Court implicitly overruled *Mulligan v. Hazard,* 777 F. 2d 340 (6th Cir. 1985), *cert. denied,* 476 U.S. 1174 (1986). and the Sixth Circuit recognized that when it handed down *Browning, supra.*

As Defendants point out, the Sixth Circuit has considered and rejected proposed application of Ohio Revised Code § 2305.09, the

four-year statute for which Plaintiffs contend. *Mulligan, supra; Hall v. Cuyahoga Valley Bd. of Educ.*, 926 F. 2d 505 (6th Cir.), *cert. denied sub nom., Hull v. Schuck*, __ U.S. __, 115 L.Ed.2d 1080 (1991); *Paladin v. Doyle*, No. 90-3242, 1990 U.S. App. LEXIS 17324 (6th Cir. Sept. 27, 1990) (914 F.2d 1494 table); and *McSurley v. Hutchinson*, 823 F. 2d 1002 (6th Cir. 1987), *cert. denied*, 485 U.S. 934 (1988). Also, in terms of its language, § 2305.10 is a general personal injury statute whereas § 2305.09 is a catch-all statute.

Plaintiffs argue, however, that this Court is bound to follow the decision of the Trumbull County Court of Appeals in *Bojac Corp. v. Kutevac*, 64 Ohio App. 3d 368 (1990), which held that § 2305.09 was the applicable statute for actions under § 1983 rather than § 2305.10. This is not a situation, however, where state law applies. In looking to state statutes of limitations under 42 U.S.C. § 1988, the federal courts are "borrowing" state law limitations into federal law. Limitations questions in § 1983 actions are unquestionably a matter of federal law. *Sevier v. Turner*, 742 F. 2d 262 (6th Cir. 1984). In any event, even if it were a question of state law, this Court would be bound to follow the view of the Sixth Circuit on what the relevant state law is, even in the face of a state intermediate appellate court decision to the contrary.

Plaintiffs also invoke the supplemental jurisdiction of this Court under 28 U.S.C. § 1367 (formerly called pendent jurisdiction). Defendants respond that the state law claims made are also barred by the relevant statute of limitations, Ohio Revised Code § 2744.04, which limits claims for improper strip or body cavity searches to two years. Plaintiffs concede this is so with respect to the City of Dayton itself, but claim that § 2744.04 does not apply to claims against the individual City employees who are Defendants and who actually conducted the searches.

Plaintiffs' position in this regard is also not well taken. The authority cited by Defendants, *Bojac, supra,* while not ultimately helpful to Plaintiffs on their federal law claim, is fatal to their state law claim. Exercising its supplemental jurisdiction, this Court is bound to follow state law and the best evidence of that law at this time is the *Bojac* decision, which holds the period of limitations in § 2744.04 applies to both cities and their employees.

Accordingly, the Complaint herein is ordered DISMISSED WITH PREJUDICE in that all claims therein are barred by the relevant statutes of limitations.

s/ Michael R. Merz
Michael R. Merz
UNITED STATES MAGISTRATE JUDGE

November 3, 1992.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

ELAINE DEATON, et al.,
Plaintiff(s),

- vs - Case No. C-3-92-152

CITY OF DAYTON, et al.,
Defendant(s)

JUDGMENT IN A CIVIL CASE

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendants' Motion for Summary Judgment (Doc. #7) is GRANTED;

that Judgment is entered in favor of the Defendants City of Dayton and Billy C. Russell and against the Plaintiffs Elaine Deaton, Constance Hurrier, Geraldine Dzikowski, Virginia Bachelier, Kathleen Dewey, Marcella Tilford, Estelle Quallen and Margaret Geis;

and that the Complaint is DISMISSED WITH PREJUDICE.

Date November 3. 1992 Kenneth J Murphy, Clerk

s/ Karla S. Evans
By) Deputy Clerk